Supreme Court, U.S.
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No. 95-1024

In The

Supreme Court of the United States

October Term, 1995

GRETCHEN GETTER,

Petitioner,

v.

WAL-MART STORES, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioner, Gretchen Getter.

SUMMARY OF THE ARGUMENT

This Court should not review the Tenth Circuit's decision in *Getter v. Wal-Mart Stores, Inc.*, 66 F.3d 1119 (10th Cir. 1995)[1], because: 1) *Getter* raises no split in authority between the circuits; 2) *Getter* does not stretch *Ross v. Oklahoma*, 487 U.S. 81 (1988), beyond its constitutional error context; 3) 28 U.S.C. § 2111 does not preclude the application of harmless-error review in nonconstitutional error cases like *Getter*; and 4) the trial court's for-cause challenge denial does not constitute a Fifth Amendment deprivation of property without due process.

REASONS FOR DENYING THE WRIT

I. The Tenth Circuit opinion does not conflict with other circuits as Petitioner alleges.

II. Getter does not stretch *Ross* beyond its constitutional error context.

III. The harmless-error review applied in *Getter* complies with 28 U.S.C. § 2111.

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[1] There are no parent or subsidiary corporations of Respondent Wal-Mart Stores, Inc., to be listed in accordance with Supreme Court Rule 29.1.

IV. The trial court's for-cause challenge denial did not violate the Fifth Amendment.

ARGUMENT

The Petition for Writ of Certiorari should be denied. The Tenth Circuit's opinion is not in conflict with decisions of other circuits. Petitioner has presented no issue which is the proper subject for review by this Court, and her Petition for Writ of Certiorari should be denied.

I. The Tenth Circuit opinion does not conflict with other circuits as Petitioner alleges.

Petitioner asserts that this case is appropriate for review because of an alleged conflict between the circuits. In support of this assertion, Petitioner focuses on *Kirk v. Raymark Industries, Inc.*, 61 F.3d 147 (3d Cir. 1995), *petition for cert. filed*, 64 USLW 3318 (Oct. 23, 1995) (No. 95-652) alleging that the Third Circuit's opinion in *Kirk* conflicts with the Tenth Circuit's opinion in *Getter*.[2] A review of the cases cited by Petitioner illustrates that no conflict exists between *Kirk* and *Getter*, and that this Court should deny Petitioner's Writ.

The decisions in *Kirk* and *Getter* are similar in that they address the impact of a trial court's denial of a for-

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[2] Petitioner also argues that the decision in *U.S. v. Annigoni*, 57 F.3d 739 (9th Cir. 1995), conflicts with *Kirk*. The *Annigoni* opinion dealt specifically with the trial court's denial of a peremptory challenge based on an erroneous *Batson* ruling. Therefore, the *Annigoni* opinion presents an issue different from *Getter* and *Kirk*, and has no bearing on the Writ before the Court.

cause challenge of a potential juror, but they present no direct conflict between the circuits. The *Kirk* and *Getter* decisions are factually distinguishable in that the *Kirk* court made a factual finding not present in the *Getter* decision. Specifically, the *Kirk* court made a factual finding based on the record that the trial court's erroneous for-cause rulings "impaired" the appellant's exercise of peremptory challenges. *Kirk*, 61 F.3d at 157. That distinct factual finding of "impairment" in *Kirk* led the Third Circuit to apply a "per se reversal" standard of review. The *Getter* court did not find that the trial court's for-cause ruling "impaired" the appellant's exercise of peremptory challenges, and applied harmless error review. *Getter*, 66 F.3d at 1123. This critical distinction prevents conflict between the opinions in *Kirk* and *Getter*.

In *Kirk*, the Third Circuit determined that a factual finding of "impairment" is a prerequisite to per se reversal review, and a trial court's erroneous denial to strike a potential juror for cause does not always "impair" the exercise of peremptories. *See Kirk*, 61 F.3d at 156-162. The *Kirk* court noted that no "impairment" occurred under the Supreme Court ruling in *Hopt v. People*, 120 U.S. 430 (1887). *Kirk*, 61 F.3d at 158, n.9. In *Hopt*, this Court reviewed a trial court's refusal to strike allegedly biased jurors for cause followed by peremptory strikes of those jurors, and stated:

> Notwithstanding the peremptory challenges made by the defendant to two of the jurors, he had several such challenges which had not been used when the jury was completed. If, therefore, the ruling of the court in disallowing the challenges to the two for bias, actual or implied, was

> erroneous, no injury to the defendant followed. Those jurors were not on the jury, and impartial and competent jurors were obtained in their place, to whom no objection was made.

Hopt, 120 U.S. at 436. Likewise, the *Kirk* court noted that no "impairment" occurred in a First Circuit decision advocating harmless-error review of an alleged peremptory challenge deprivation. *Kirk*, 61 F.3d at 162, n.17 (*citing Kotler v. American Tobacco Co.*), 926 F.2d 1217 (1st Cir. 1990), *vacated on other grounds*, 505 U.S. 1215, 112 S.Ct. 3019, 120 L.Ed.2d 891 (1992), *reaffirmed*, 981 F.2d 7 (1st Cir. 1992). Arguing for reversal of an adverse jury verdict on a negligence claim, the plaintiff in *Kotler* asserted that the trial court deprived her of her last peremptory challenge. *Kotler*, 926 F.2d at 1226-27. The First Circuit responded:

> There is nothing in the record to indicate that any seated member of the jury was unsatisfactory to appellant or that she would have employed yet another peremptory challenge, if she possessed one, to remove any other juror. Such a showing is required for reversal.

Kotler, 926 F.2d at 1227 (*citing Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir. 1984)) ("In the absence of any indication that the jury selected was unsatisfactory to plaintiff at the time chosen, we are unwilling to reverse the verdict of a jury that to all appearances was disinterested, competent and suitable."), *cert. denied*, 469 U.S. 852 (1984).

The "no impairment" harmless-error line of authority recognized in *Kirk* contains several other cases not cited in *Kirk*. In *Stroud v. United States*, 251 U.S. 380 (1920), the Supreme Court ruled that a criminal defendant suffered no prejudice from an erroneous denial to strike a biased

juror for-cause because the defendant peremptorily struck that juror, retained peremptories after that strike, and could not show that anything other than an impartial jury sat at trial. *Id.* at 382 (*citing Spies v. Illinois*, 123 U.S. 131 (1887)). The Second Circuit twice applied harmless-error review when parties exercised peremptory challenges to correct alleged erroneous denials of for-cause strikes of potential jurors. *See U.S. v. Towne*, 870 F.2d 880, 885 (2nd Cir. 1989), *cert. denied*, 490 U.S. 1101 (1989); *U.S. v. Brown*, 644 F.2d 101, 104 (2d Cir. 1981), *cert. denied*, 454 U.S. 881 (1981). In these cases, if the record indicates the aggrieved party retained additional peremptories or contains no indication that the party would have exercised another peremptory, if another existed, then no "impairment" of peremptories occurred and the erroneous ruling is subject to harmless-error review.

The *Getter* opinion falls directly under the harmless-error umbrella. As in *Kotler*, the First Circuit case cited with apparent approval in *Kirk*, nothing in the *Getter* record indicates that Petitioner was unsatisfied with any seated juror, or that she would have removed another juror had she possessed another peremptory. *Getter*, 66 F.3d at 1123. Because no impairment of Petitioner's peremptories occurred, even the *Kirk* court would apply harmless-error review in *Getter*.

Almost three decades of Supreme Court jurisprudence supports the application of the harmless-error standard of review under the facts presented in this case. Since *Chapman v. State of California*, 368 U.S. 18 (1967), when this Court first reviewed a constitutional error under the harmless-error standard, harmless-error review has gained broad approval in both constitutional and

nonconstitutional error contexts. *See, e.g., United States v. Hasting*, 461 U.S. 499 (1983) (applying harmless-error analysis to constitutional error); *United States v. Lane*, 474 U.S. 438 (1986) (applying harmless error analysis to non-constitutional error). This Court in *Hasting* explained the preference for harmless-error review:

> *Chapman* reflected the concern, later noted by Chief Justice Roger Traynor of the Supreme Court of California, that when courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead 'impregnable citadels of technicality.' "

Hasting, 461 U.S. at 509 (*citing* R. Traynor, *The Riddle of Harmless Error* 14 (1970)) (quoting Kavanagh, *Improvement of Administration of Criminal Justice by Exercise of Judicial Power*, 11 ABAJ 217, 222 (1925)). Consistent with the above philosophy, this Court applied harmless-error review to an erroneous for-cause challenge denial raised on appeal as constitutional error. *Ross v. Oklahoma*, 487 U.S. 81 (1988). *Ross* and this Court's general approval of harmless-error review support the Tenth Circuit's *Getter* opinion.

Getter falls under the harmless-error standard of review authority recognized by the *Kirk* court. Had the Tenth Circuit determined that the trial court's for-cause ruling "impaired" Petitioner's exercise of peremptory challenges and reviewed such error under the harmless-error standard, *Getter* would conflict with *Kirk*. Because the court found no "impairment," a conflict is not presented between the *Getter* and *Kirk* opinions. Therefore, Petitioner's Writ should be denied.

II. Getter does not stretch *Ross* beyond its constitutional error context.

As a second reason for review, Petitioner asserts that *Getter* conflicts with *Kirk* because the Tenth Circuit held that *Ross v. Oklahoma*, 487 U.S. 81 (1988), mandates harmless-error review of an erroneous for-cause challenge denial in the constitutional and nonconstitutional error contexts. *Getter* raises no question for this Court's review regarding the interpretation of this Court's opinion in *Ross* because *Getter* did not extend *Ross* beyond its constitutional error parameters. The portion of the *Getter* opinion labeled "Denial of For-Cause Challenge to Prospective Juror" contains an analysis of three separate issues: judicial discretion in the for-cause challenge context; the constitutional implications of an erroneous denial of a for-cause challenge; and the nonconstitutional implications of an erroneous for-cause ruling. *Getter*, 66 F.3d at 1122-23. The Tenth Circuit relied on *Ross* only in its constitutional error analysis to conclude that "the district court's erroneous denial of plaintiff's for-cause challenge did not violate the Fifth Amendment or the Seventh Amendment." *Id.* *Getter* does not stretch *Ross* into the nonconstitutional error context. Accordingly, *Getter* prompts no need for this Court's interpretation of *Ross*'s scope, and Petitioner's Writ of Certiorari should be denied.

III. The harmless-error review applied in *Getter* complies with 28 U.S.C. § 2111.

The plain language of 28 U.S.C. § 2111 requires appellate courts to affirm judgments without regard to

harmless errors that occurred at trial. Petitioner asserts the trial court in *Getter* committed a nonconstitutional error by refusing to strike for cause a potential juror. The standards in *Kotteakos v. United States*, 328 U.S. 750 (1946), determine when a reviewing court should disregard a nonconstitutional error and affirm judgment:

> A non-constitutional error is harmless unless it had a "substantial influence" on the outcome [of the trial] or leaves one in "grave doubt" as to whether it had such effect.

Id. at 765. The Tenth Circuit applied *Kotteakos* in holding the trial court's nonconstitutional error harmless. *Getter*, 66 F.3d at 1123. By applying *Kotteakos* and affirming Wal-Mart's judgment, the Tenth Circuit complied with 28 U.S.C. § 2111, which clearly does not mandate reversal.

IV. The trial court's for-cause challenge denial did not violate the Fifth Amendment.

In her "Reasons For Granting Writ," Petitioner questions whether the trial court's for-cause ruling deprived her of property without due process in violation of the Fifth Amendment. However, Petitioner cites no support for this proposition. The Tenth Circuit's opinion raises no Fifth Amendment violation.

Assuming the *Getter* court "deprived" Petitioner of a peremptory challenge, peremptories are not constitutionally protected property interests because they are "in the nature of a statutory privilege." *Frazier v. United States*, 335 U.S. 497, 505 n.11 (1948). As stated by this Court in *Georgia v. McCollum*, 505 U.S. 42, 55 (1992), peremptory challenges are "not constitutionally protected

fundamental rights; rather, they are but one state-created means to the constitutional end of an impartial jury and a fair trial."

Further assuming peremptories are constitutionally protected property rights, the trial court's for-cause ruling did not violate constitutional due process mandates because Petitioner received all three peremptories under 28 U.S.C. § 1870, and Petitioner recorded no complaint regarding the partiality of the jury that actually sat. *See Ross v. Oklahoma*, 487 U.S. 81, 90 (1988) ("[H]e received all that Oklahoma law allowed him, and therefore his due process challenge fails."); *United States v. Brown*, 644 F.2d 101, 104 (2d Cir. 1981) ("The absence of proof here that the jury that heard Brown's case was in fact partial precludes the defendant from successfully claiming a deprivation of due process."), *cert. denied*, 454 U.S. 881 (1981). Petitioner, like the appellant in *Brown*, never indicated a concern over jury impartiality. *Getter*, 66 F.3d at 1123. Petitioner raises no novel Fifth Amendment issue deserving review by this Court.

CONCLUSION

The Tenth Circuit's opinion in *Getter* does not conflict with the Third Circuit's opinion in *Kirk*. The decisions are factually distinguishable and do not present a conflict that would form the basis for review by this Court. For these reasons, Respondent respectfully urges the Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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